STATE OF MICHIGAN

COURT OF APPEALS

RONNIE L. STRUNK,

Plaintiff/Counter-Defendant-Appellant,

v

PAMELA A. STRUNK,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
February 15, 2007

No. 264246
Oakland Circuit Court
LC No. 2004-698096-DM

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Plaintiff Ronnie Strunk appeals as of right the judgment of divorce entered on June 15, 2005. Plaintiff filed for divorce on September 8, 2004, and the parties agreed to a partial settlement on March 28, 2005, which left only the levels of child and spousal support to be determined by the court. The trial court set those amounts in an opinion and order issued May 19, 2005, and incorporated the amounts into the judgment that is now subject to this appeal. Plaintiff agrees that he should be obligated to pay child and spousal support, but not in the amounts ordered by the trial court. We vacate and remand for reconsideration the child and spousal support awards set forth in the judgment of divorce.

Plaintiff first argues that the trial court erred when it used an average of his past three years' income, $56,472, to set child support. We agree. An award of child support rests in the sound discretion of the trial court, and its exercise of discretion is presumed to be correct. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1993). The party appealing the support order bears the burden of showing that a mistake was committed. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990). We review the trial court's factual findings for clear error, reversing only if, based on all of the evidence, we are left with a firm and definite conviction that a mistake was made. *Id.* at 805. However, we review a trial court's ultimate support disposition and issues of law de novo. *Id.* at 804-805; *Edwards v Edwards*, 192 Mich App 559, 562; 481 NW2d 769 (1992).

When setting child support, the trial court must follow the formula set forth in the Michigan Child Support Formula manual (hereinafter 2004 MCSF manual), unless it would be unjust or inappropriate. MCL 552.519(3)(a)(vi); MCL 552.605(2); *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000); *Shinkle v Shinkle (On Rehearing)*, 255

Mich App 221, 225-226; 663 NW2d 481 (2003). Although the formula is based on the needs of the child and the actual resources of each parent, MCL 552.519(3)(a)(vi), income averaging is appropriate under certain circumstances:

> Where there is evidence of considerable variation in income due to seasonal employment, overtime, second jobs, bonuses, or profit sharing, etc., information from at least the preceding twelve months should be used in calculating net income. Certain occupations and self-employed persons may have considerable variation in income from year to year. The use of three years' income information is recommended where such variation exists. [2004 MCSF Manual, §2.01(C)]

The trial court, without explanation, used an average of plaintiff's past three years income (2002-2004) to set the level of child support. Pursuant to this computation, the trial court found plaintiff's income, for purposes of calculating support, to be $56,472 annually. Plaintiff's income during those three years before the divorce varied by $6,781 or less than 12 per cent, which is not a "considerable" variation. The trial court's ruling was issued in May 2005, and plaintiff's gross income at that time was $720 per week, which he received as an employee of Eisenhardt Excavating. Plaintiff had been permanently laid off by his former employer in November 2004. He started with Eisenhardt in March 2005. The record indicates plaintiff was hired by Eisenhardt in "a full time position 12 months out of the year." With a weekly gross income of $720, plaintiff would earn $37,440 annually. The trial court did not take into consideration the income plaintiff began earning in 2005 with Eisenhardt.

The large drop in income in 2005 was based on plaintiff losing his prior job due to a permanent layoff and subsequently accepting a lower paying job, and not because he worked in a "certain occupation" or was seasonally employed. The variation in income was also not based on overtime, second jobs, bonuses, or profit sharing. Moreover, income averaging is appropriate where the individual, being self-employed or working in a comparable environment, has significant freedom and control over the jobs taken and hours worked, and thus has the power to temporarily limit his or her income considerably to avoid paying the proper level of support. Plaintiff worked as an hourly underground construction worker, which is not the type of occupation that the formula was meant to address with respect to income averaging. Finally, we also believe that income averaging was inappropriate in this case because plaintiff provided evidence that his hours and wages will not vary in his present job.

Plaintiff argues that by using an average of plaintiff's income, the trial court was implicitly imputing additional income to plaintiff. Assuming that the court was imputing income, the imputation of income was error. Our courts have "broadened the limits of 'actual resources' to include certain payers' unexercised ability to pay" and have held that imputation of additional income is appropriate when a parent voluntarily reduces income or otherwise fails to exercise his or her ability to earn an income in order to avoid paying support. *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998); *Rohloff v Rohloff*, 161 Mich App 766, 772-775; 411 NW2d 484 (1987). The reduction in income does not have to be the result of bad faith or of willful disregard for a party's children, only voluntary. *Olson v Olso*n, 189 Mich App 620, 621-622; 473 NW2d 772 (1991), aff'd 439 Mich 986 (1992).

Defendant alleged that plaintiff voluntarily left his job in November 2004 and refused to seek gainful employment after learning that he would likely owe support, but she offered no relevant evidence to support her claim.[1] Plaintiff claimed that he was laid off in November 2004 and was unable to find a permanent position until March 2005, after the winter, "slow" construction season was over. Plaintiff also maintained that an $18 per hour job was the best he could find in this difficult economy. Although we cannot state with any certainty that such was the case, there is no pertinent evidence in the record before us that plaintiff was being dishonest and attempting to avoid paying support or that plaintiff has an unexercised ability to earn more than his current salary. The trial court certainly has discretion to decide facts; however, its findings must be "independently supported or otherwise corroborated by the evidence on the record" or they are error. *Foskett v Foskett*, 247 Mich App 1, 13; 634 NW2d 363 (2001). We also note that the trial court did not make any findings of fact regarding the imputation factors outlined in the 2004 MCSF manual in § 2.10(E).

Finally, we also conclude that the trial court erred when it found as fact that defendant earned only $134 per week. Defendant admitted that her income, including the state support for the parties' minor child, was $185 per week. In addition, defendant's pay stub clearly shows that she earned an average of $211 per week in the first quarter of 2005.[2]

Plaintiff also argues on appeal that the trial court erred when it set the level of spousal support using income averaging to impute additional income. We agree. A trial court's findings of fact relative to spousal support are reviewed for clear error. *Beason, supra* at 805. If the trial court's findings are not clearly erroneous, then we must determine whether the award of spousal support was fair and equitable in light of the underlying facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

The trial court may award spousal support at its discretion, *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003), and may impute additional income to a party in determining a correct spousal support award if it finds that the party voluntarily reduced his income or has an unexercised ability to earn income, *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989). The test for the appropriateness of imputing income when determining spousal support is the same as that for child support, i.e., whether a spouse voluntarily reduced his or her income to avoid paying support. *Id.* As we discussed above, there is no credible evidence in the record before us that plaintiff voluntarily reduced his income to avoid paying spousal support. To the extent that the trial court, in rendering its award of spousal support, imputed income to plaintiff

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[1] Defendant submitted two employment ads that were allegedly ignored by plaintiff in an attempt to support her claim that plaintiff was not making an effort to find a new job; however, neither posting is dated and there is no evidence that plaintiff was aware of the ads, thereby giving the documents no weight.

[2] On remand, the trial court may certainly entertain any arguments that the $211 weekly average should not be considered for whatever reasons defendant may advance, assuming a challenge by defendant.

and/or relied on the three-year average income earned by plaintiff between 2002 and 2004, as opposed to his actual current income, the court erred.

We vacate the child and spousal support amounts in the judgment of divorce and remand for reconsideration in accordance with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter